SUPREME COURT, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1969

No. 599

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC.,
Appellant

versus

UNITED STATES OF AMERICA,
Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinion Below

The opinion of the District Court, which has not been reported, is appended hereto at page 13 below.

Jurisdiction

This is a civil Government antitrust action brought under the Sherman Act (15 USC §1), in which the District Court has granted a partial final summary judgment under Rules 54(b) and 56, FRCP. The judgment is dated June 24, 1969, and was entered on the same date. This Court has jurisdiction of this appeal therefrom under 15 USC §29. See *United States vs Diebold, Inc.*, 369 US 654 (1962).

Question Presented

Whether a United States District Court may properly grant summary judgment where the motion, pleadings, and evidence before it raise genuine issues of disputed facts as to material allegations in the complaint.

Statement of the Case

This civil antitrust action was commenced by the United States in 1964, under §1 of the Sherman Act, 15 USC §1. The complaint contains several allegations of unlawful actions on the part of the defendant ("AGC"), which is a trade association of general contractors in the New Orleans area. The background facts relevant to the allegations pertinent to this appeal are: AGC's by-laws provide for payment of dues, subject to a fixed minimum annual amount, equal to a small percentage of the total contract price of all work obtained by the member in the greater New Orleans area; on occasional large projects, a smaller flat amount is fixed as dues. Pl. Ex. 1, Art. 6J; Pl. Ex. 17-20. During the period 1947-65, AGC had five successive contracts with M. M. Caraway Company; with some variations, these provided that at the request of a specified number of AGC members, Caraway would make a "quantity survey" (an estimate of the materials required) for any construction job in the greater New Orleans area; that the survey would be available to all AGC members; that Caraway could furnish copies of the survey to non-members of AGC; that Caraway's fee for making the survey would be paid by the contractor who obtained the job, if a member of AGC or if a non-member who used the survey; and that (in some of

the earlier contracts only), if that contractor was a non-member of AGC to whom Caraway had furnished a copy of the survey, Caraway's fee would be increased by an amount equal to the amount which would have been payable to AGC as dues had the successful bidder been a member of AGC. Pl. Ex. 3-7.

The Government does not charge any impropriety in the method of computation and payment of AGC dues, or in the fact that members are free to include the amount of these dues in their bids if they choose to do so. The Government could hardly take exception to these matters, since they were expressly declared lawful by a consent decree entered in a prior Government antitrust action against AGC in 1940. Def. Ex. 18.

The allegations here pertinent are the Government's charges that AGC and its members have engaged in a conspiracy consisting of a "continuing understanding and concert of action among" them, "the substantial terms of which" are (1) that each member should include in its bids the quantity survey fee and its AGC dues, and (2) that non-members "should be urged and induced to include" AGC dues in their bids, and, if successful in obtaining a contract, to pay such dues to AGC. Complaint, ¶15(a), (b) and (c).

The Government subsequently moved for partial summary judgment that (in the aspects here pertinent) (1) AGC, its members and non-member contractors "entered into agreements and understandings whereby members, as well as nonmembers, . . . included defendant's dues in their bid price", and (2) AGC and Caraway "entered into agree-

ments which resulted in members of the defendant including the quantity survey cost in their bid price".

The District Court granted this motion as to the stated aspects, and entered a partial final judgment perpetually enjoining AGC and its members "from, directly or indirectly, inducing or requiring members of the defendant, or nonmembers, to include in their bids on any building construction project in the New Orleans metropolitan area, any charges for: (a) quantity surveys; or (b) chapter dues." The judgment also required AGC to dissolve its Quantity Survey Committee, and enjoined it from forming any other committee to administer any program whereby AGC and its members agree among themselves or with anyone else to include quantity survey costs or AGC dues in bid prices. Appendix, p. 25, below.

In support of its motion for summary judgment, the Government relied on the successive quantity-survey contracts between AGC and Caraway, none of which required inclusion of quantity-survey costs in bids (Pl. Ex. 3-7); a letter from AGC's President to a non-member firm simply describing one of the Caraway contracts (Pl. Ex. 8); a letter from the President (Martin Gurtler) of an AGC member to AGC's then Managing Director concluding that the Government had paid for the quantity survey on a naval construction job obtained by another member (Pl. Ex. 9); minutes of a 1958 meeting of AGC's Quantity Survey Committee in which one member's representative objected to the arrangement with Caraway and indicated that his company included the survey costs in its bids (Pl. Ex. 10); and a series of letters from AGC's former Managing Director to out-of-

state contractors merely describing the arrangement with Caraway (Pl. Ex. 11-14).

On the dues issue, the Government relied on AGC's by-law provision as to dues, which does not state that they are to be included in bids (Pl. Ex. 1, Article 6J); a letter from AGC's former Managing Director to an out-of-state contractor stating that all contractors bidding on a certain project had agreed to abide by AGC's rules (Pl. Ex. 17); minutes of AGC board meetings at which dues for particular projects were fixed at flat amounts (Pl. Ex. 18-20); a series of letters written in 1949 by AGC's former Managing Director to several out-of-state contractors in which he referred to AGC's dues rule and suggested that the addressees take cognizance of these dues in computing their overhead costs for a particular job (Pl. Ex. 21-27); the agenda prepared by AGC's former Managing Director for a 1950 board meeting, one of the items listed on which was a proposal that dues be waived as to jobs bid by non-members, because of the "possible disadvantage" to members of inclusion in their bids of dues not included by non-member bidders (Pl. Ex. 16); a 1950 letter from AGC's former Managing Director to an out-of-state contractor stating that all out-of-state bidders on a certain job had agreed to pay AGC dues, and that this put all bidders on the same footing as far as such dues are concerned (Pl. Ex. 28); a 1950 telegram by AGC's former Managing Director requesting out-of-state bidders on a project to agree in advance to take out membership in AGC if successful (Pl. Ex. 29); a response by an out-of-state bidder agreeing to do so if

the others did so (Pl. Ex. 30); the former Managing Director's reply confirming that the other out-of-state bidders had so agreed (Pl. Ex. 31); the minutes of an AGC board meeting reflecting a similar agreement by two out-of-state bidders on another job (Pl. Ex. 32); and three of the intermediate agreements with Caraway (Pl. Ex. 3, 4 and 6) which required Caraway to increase its fee, if charged to a non-member of AGC, by the amount of AGC dues for the project (the latest, 1957, agreement with Caraway contained no such requirement, Pl. Ex. 7).

It will be noted that the great bulk of this evidentiary material relates solely to AGC's efforts to induce non-member successful bidders on New Orleans jobs to pay AGC dues and quantity survey costs. The complaint does not allege that these efforts were unlawful, and neither the motion for summary judgment nor the judgment itself refers to them. The Government relied on all of this evidence solely as justifying an inference therefrom of the existence of agreements and inducements among AGC, its members and non-member bidders for inclusion of the dues and survey costs in all bids. The only part of the evidence which might actually justify such an inference are the letter from Mr. Gurtler (Pl. Ex. 9) indicating his assumption that all bidders on one job included the survey cost in their bids; the 1949 series of letters by AGC's Managing Director (Pl. Ex. 21-27) suggesting that out-of-state bidders include AGC dues in their bids on a particular project; and the 1950 agenda prepared by the Managing Director (Pl. Ex. 16) indicating "possible disadvantage" to members of inclusion

in their bids of dues not payable by non-member bidders.

In opposition to the motion for summary judgment, the defendant introduced an affidavit by Mr. Gurtler stating that his letter (Pl. Ex. 9) reflected nothing more than an assumption on his part that bidders included the survey cost in their bids along with their other costs (Def. Ex. 53); an affidavit by AGC's former Managing Director stating that when he wrote the 1949 letters and prepared the 1950 agenda he was newly employed and unaware of AGC's policy, dating from the 1940 consent decree, against agreements or inducements for inclusion of dues or survey costs in bids (Def. Ex. 20); minutes of a 1951 AGC board meeting in which the former Managing Director was advised of the AGC policy and instructed to conform to it (Def. Ex. 19); and affidavits by numerous present and former officials of AGC and representatives of all of its members, some of whom have been members since 1947, categorically denying the existence of any agreement or inducement for inclusion of dues or survey costs in bids (Def. Ex. 1, pp. 7-8, Def. Ex. 21, pp. 1-2, Def. Ex. 26-56).

In granting the motion for summary judgment as to the dues and survey costs, the District Court rendered an opinion in which it found that "the evidence presented by the Government admits of but one conclusion, namely that it was a practice of members of the defendant association to include the quantity survey costs in the bid price, regardless of whether such members desired or requested such quantity survey"; that "the combi-

nation between the members as to the quantity survey fee had the purpose and effect of raising prices"; that "the agreement here passed on to the owner, an item in the bid price that may or may not have been required by some of the member contractors"; and that "the effect of the obligatory agreement was to take away an incentive for the contractors to use their own initiative in computing their bids." Appendix, pp. 20-21, below.

On the dues issue, the Court found that "the plaintiff contends the defendant attempts to get all bidders, whether members or not, to agree to include the amount of dues in their bids and does in fact obtain such agreements among the bidders"; and that "it is evident from defendant's own documents, by-laws and admissions that such agreements have been obtained and a concerted understanding does exist". Appendix, pp. 21-22, below.

The Question is Substantial

The Government has persuaded the District Court in this case to render a final summary judgment of perpetual injunction, with its resulting prima facie evidentiary effect under 15 USC §16(a), on the basis of a flying inferential leap from scattered documents dating back as long as 20 years, to a flat finding of the existence of an unlawful agreement and concerted understanding, in the face of opposing affidavits and later documentary evidence tending to invalidate the inferences relied on by the Government and flatly denying the existence of the alleged unlawful agreement.

The judgment below is directly contrary to both the provision of Rule 56(c), FRCP, that summary judgment may be granted only when the evidentiary materials of record disclose "no genuine issue as to any material fact", and this Court's holding that "on summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion". *United States vs Diebold, Inc.*, 369 US 654, 655 (1962).

This Court has led the way in restricting use of the summary judgment procedure to its proper function—decision of legal issues when the relevant facts are undisputed—and in disapproving attempted use of this procedure to short-cut trial of disputed fact issues. *Sartor vs Arkansas Natural Gas Corp.*, 321 US 620 (1944).

Especially in antitrust and other complex cases "where motive and intent play leading roles" and are sought to be inferred from "complicated courses of legislation, contracting and practice", this Court has held that summary judgments may not be granted unless from the record looked at "in the light most favorable to . . . the party opposing the motion", "it is quite clear what the truth is", and the opposing party's contentions have been "conclusively disproved". *Norfolk Monument Co. vs Woodlawn Memorial Gardens*, 394 US 700, 704 (1969); *White Motor Co. vs United States*, 372 US 253, 259 (1963); *Poller vs Columbia Broadcasting System*, 368 US 464, 472-73 (1962); *Kennedy vs Silas Mason Co.*, 334 US 249, 256-57 (1948).

In the rare antitrust case in which summary judgment has been affirmed, this Court has emphasized that it did so either on the basis of "facts which the appellants admitted", or because the opposing party failed to make any showing, by affidavit or otherwise, of disputed fact issues; and has stressed the fact that "such judgments shall not be rendered . . . where there are genuine disputes of fact on material issues", and that "all that is required [to preclude summary judgment] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Associated Press vs United States;* 326 US 1, 7 (1945); *First National Bank vs Cities Service Co.*, 391 US 253, 288-89 (1968).

In *United States vs Diebold, Inc.*, 369 US 654, 655 (1962), on the Government's appeal, this Court reversed a summary judgment granted against the Government in a civil antitrust case. This Court held:

> "In any event both findings [by the District Court] represent a choice of inferences to be drawn from the subsidiary facts contained in the affidavits, attached exhibits, and depositions submitted below. On summary judgment the inferences, to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ulti-

> mate facts material to the rule of *International Shoe Co. v. Federal Trade Comm'n*, it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment. Fed. Rules Civ. Proc., 56(c)."

It is respectfully submitted that the lower Court's action in the instant case is a clear departure from this Court's holding in *Diebold*. Not only was the District Court presented with a controverted issue of fact, but it failed—as it must—to view the material before it in the light most favorable to the appellant. There has thus been raised a substantial question of departure from Rule 56 and the controlling decisions of this Court. It is, accordingly, proper for this Court to exercise its power of summary reversal as it has done in the past when confronted with a departure from clearly controlling precedents. *United States vs Haley*, 358 US 644 (1959); *Norfolk Monument Co. vs Woodlawn Memorial Gardens*, 394 US 700 (1969).

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APPENDIX.

Opinion of the District Court

CHRISTENBERRY, J.

On January 28, 1964, the United States of America filed a civil suit against the New Orleans Chapter, Associated General Contractors of America, Inc. The complaint alleged that the defendant was in violation of 15 U.S.C.A. §1, the Sherman Act, by being engaged in an unlawful combination and conspiracy in restraint of interstate trade and commerce. The New Orleans Chapter, American Institute of Architects and the Construction Indemnity Association of New Orleans, Inc., not made defendants in this suit, were named as co-conspirators with the defendant in the complaint.

The plaintiff, United States of America, alleges that this combination and conspiracy has consisted of a continuing understanding and concert of action between the defendant and the co-conspirators, the substantial terms of which have been and are:

(a) That Bidding Rule C of defendant's by-laws requiring that members of the Association should boycott and refuse to submit competitive bids on building construction projects for which the owner or architect intends to accept, or in fact accepts, separate bids from subcontractors;

(b) That each member of the defendant Association bidding on building construction proj-

ects in the New Orleans metropolitan area should include quantity survey costs in the bid price, regardless of whether such member desired and requested such quantity survey, and that the successful bidder only should pay those quantity survey costs.

(c) That each member of the defendant Association and non member bidding on any construction project in the New Orleans metropolitan area should include Chapter dues in his bid price, and that the successful bidder only should pay dues to the defendant Association.

On April 30, 1964 the defendant filed an answer denying the plaintiff's charges that it had violated the Sherman Act. It contended that its requirements for members did not have the effects alleged in the complaint. Specifically they answered

1) That its bidding rules were adopted for the purpose of promoting economic, coordinated, harmonious and properly supervised construction work and constituted reasonable and lawful self regulation by members of the defendant.

2) That as a result of a previous civil action in this Court (Civil Action No. 249) between the plaintiff and defendant, a final decree was entered on January 13, 1960 under which members of the defendant were permitted to take into account the element of dues in figuring bids, and this decree gives indemnity as to that bidding practice.

3) That in order to insure harmonious labor relations and to meet the various members' labor contract requirement of using only union labor, it has been necessary, as provided in Bidding Rule C, for members of defendant to contract directly with subcontractors.

On August 15, 1968, the plaintiff filed a motion for summary judgment in accordance with Rule 56(a), (c) and (d), Federal Rules of Civil Procedure. Rule 56(a) provides that a party may file a motion for summary judgment after twenty days have elapsed from commencement of the suit.

Rule 56(c) provides in pertinent part:

> "Motion and Proceedings Thereon . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56(d) allows the court to:

> ". . . ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. . . . Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly."

It is necessary for this court to decide whether there are any genuine issues of material facts.

I.

BIDDING RULE C

Bidding Rule C of Article 12 of Defendant's by-laws provides:

> "Competitive bids shall not be submitted on any project unless all of the items necessary to complete the job are included in the bid on the general contract. All items entering into the general contractor's bid are to be based upon prices, costs and estimates solicited or otherwise obtained directly by the general contractor from the subcontractors or vendors involved. This Rule is intended to prohibit members from submitting competitive bids in cases where the owner or architect takes bids direct from one or more classifications or subcontractors."

Plaintiff contends that there is no genuine issue of material fact as to Bidding Rule C because it is a combination and conspiracy to engage in a group boycott and is, therefore, a per se violation of the anti-trust laws.

Defendant admits that Bidding Rule C was adopted as part of its by-laws, but it contends that the rule is not illegal per se. In support defendant says that Bidding Rule C is not an agreement to boycott but is a reasonable act of self-regulation adopted for the proper business purpose of promoting economic, coordinated, harmonious and properly supervised construction work.

A group boycott has been construed as "concerted refusals by traders to deal with other traders." Klor's, Inc. v.

Broadway-Hule Stores, Inc., 359 U.S. 207, 212 (1959). It is a group action to coerce third parties to conform to the pattern of conduct desired by the group. Certain group boycotts have been construed as illegal per se under the Sherman Act and, therefore, not susceptible to a defense of explanation of reasonableness. Fashion Originators Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457 (1941); United States v. Columbia Steel Co., 334 U.S. 495 (1948); Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958); Klor's, Inc. v. Broadway-Hule Stores, Inc., supra. After reviewing these cases dealing with group boycotts, it is difficult to sustain the plaintiff's contention that Bidding Rule C is a boycott that falls within the per se category.

In Northern, supra, the Court said the policy basis of the Sherman Act is competition. It prohibits "every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states." The Court said that this prohibition has been limited only to those contracts or combinations which "*unreasonably*" (emphasis supplied) restrain competition, citing Standard Oil of New Jersey v. U.S. 221 U.S. 1 (1910) and Chicago Board of Trade v. U.S., 246 U.S. 231 (1917). The Court further defined illegal *per se* violations as those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."

An agreement to deal on specified terms means refusal to deal on other terms. While it would appear that Bidding

Rule C implies a restraint, it is not clear on its face whether it has an adverse effect on competition and lacks any redeeming virtues. There is a need to hear the evidence as to the underlying reason for the rule and also its effect. In all the cases dealing with group boycotts and the per se rule, economic profit has clearly been the motive and elimination of competition has been the intent. In Fashion, supra, the Court's decision turned on a finding that, "the aim of the plaintiff's combination was the intentional destruction of one type of manufacture and sale which competed with Guild (association) members." In Klor's, supra, there was a concerted refusal by defendants to sell merchandise to plaintiff for resale. Clearly the motive was economic gain at the expense of another. It has been said that the per se rule laid down by the Supreme Court in Klor's will not be followed when economic profit is not the motive of the boycott or where there is justification for the boycott and also that "A boycott rule which is not geared to a cogent test of effect on competition is thus completely unmanageable."

To see whether Bidding Rule C has an effect on competition is important, because as has been stated, the concern of the statute is the protection of competition. There must be an "unreasonable" restraint on competition before the rule in question can be condemned as a per se violation of the statute.

Note: 62 Columbia L.Rev. 475, 490 and note 72. See also "Joint Ventures and Boycotts: Some Suggestions on Per Se" 15 Stanford L.Rev. 638

See Rahl, Per Se Rules and Boycotts under the Sherman Act, 45 Univ. of Va. L. Rev. 1165 at 1172.

In White Motor Co. v. U.S., 372 U.S. 253 (1963) the Court referred to certain group boycotts as "naked restraints of trade with no purpose except stifling of competition." The Court said further that in an area "where motive and intent play leading roles" summary judgment is not appropriate.

Such is the case here. It is not clear whether this rule has such a "pernicious effect on competition and lack of any redeeming virtue" that it should be classified as a per se violation of the Sherman Act. Here the applicable legal principle turns on a rule of reason, and the application of the law is influenced by the shape of the facts as they emerge at trial and should not be applied prematurely in a summary adjudication. Rule C cannot on its face be determined to be a violation of the Sherman Act; there are genuine issues of fact and the motion for summary judgment as it pertains to Bidding Rule C must be denied.

II.

QUANTITY SURVEY FEE

The alleged conspiracy concerning the quantity survey fee arises from the agreements entered into between defendant and the M. H. Caraway Company (hereinafter referred to as "Caraway"). Caraway furnished quantity surveys upon the request of a contractor or an organiza-

A quantity survey is a detailed listing of the items and amounts of material required for construction of a structure, and is used by contractors in calculating bids on given projects although the survey is not concerned with price or cost of the items listed.

tion such as defendant. The plaintiff contends that there was an agreement that each member of the defendant association bidding on building construction projects in the New Orleans metropolitan area should include quantity survey costs in the bid price, regardless of whether such member desired and requested such quantity survey; and that the successful bidder only should pay those quantity survey costs.

Plaintiff supports this contention for summary judgment upon the defendant's answer to the complaint, defendant's amended response to plaintiff's request for admissions, defendant's answer and amended answers to the plaintiff's interrogatories, defendant's by-laws, and plaintiff's documents marked exhibits 1 through 32. The plaintiff contends there is no genuine issue as to any material fact. With this contention we agree. The evidence presented by the Government admits of but one conclusion, namely that it was a practice of members of the defendant association to include the quantity survey costs in the bid price, regardless of whether such members desired or requested such quantity survey; and that the successful bidder only should pay those quantity costs.

Under the Sherman Act, it has been held that "competition, not combination, should be the law of the trade." National Cotton Oil Co. v. Texas, 197 U.S. 115, 129 (1905). Any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate commerce is illegal per se." U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). Once a combination has been construed as illegal

per se under the Sherman Act, it is not susceptible to a defense or explanation of reasonableness. Northern Pacific Railway Co. v. U.S., 356 U.S. 1 (1958).

It is abundantly clear that the combination between the members as to the quantity survey fee had the purpose and effect of raising prices. Such a combination "cripples the freedom of traders and thereby restrains their ability to sell in accordance with their own judgment." Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951).

The agreement here passed on to the owner an item in the bid price that may or may not have been required by some of the member contractors, who were bidders. The effect of the obligatory agreement was to take away an incentive for the contractors to use their own initiative in computing their bids. Thus an element of competition was affected and there is a lack of any redeeming virtue in making this survey compulsory on the members. As such, there is no genuine issue of material fact here and the motion for summary judgment as pertains to this issue should be and is granted.

III.

CHAPTER DUES

The plaintiff alleges there has been a combination and conspiracy between defendant and co-conspirators that defendant's dues be included in the bid price. The dues, which are paid by members of the defendant and by both member and non-member out-of-state general

contractors, are based upon a percentage of the bid price of each individual job awarded to the bidder. Only the successful bidder pays the dues on a particular job. The plaintiff contends the defendant attempts to get all bidders, whether members or not, to agree to include the amount of dues in their bids and does in fact obtain such agreements among the bidders. It is evident from defendant's own documents, by-laws and admissions that such agreements have been obtained and a concerted understanding does exist. Even though the scope of this unlawful combination is not expressly spelled out in any single agreement, it has long been settled that a conspiracy can be found in the concerted course of action of the parties. U.S. v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948); Interstate Circuit v. U.S., 306 U.S. 208, 226-227 (1939), U.S. v. Masonite Corp., 316 U.S. 265, 275 (1942).

This is another example of a "combination formed for the purpose and with the effect of raising . . . the price of a commodity in interstate commerce [and] is illegal per se." U.S. v. Socony-Vacuum Oil Co., supra.

The defendant argues that as a result of a previous civil action in this Court (Civil Action No. 249) between the plaintiff and defendant, a final decree was entered on January 13, 1940 under which members of the defendant were permitted to include in bids an amount representing dues in the association and that this decree is res judicata as to that bidding practice. With this we cannot agree.

The per se doctrine had its genesis in U.S. v. Trenton Potteries Co., 273 U.S. 392 (1927). In that case the Court

held that a vertical price-fixing arrangement is a per se violation of the anti-trust laws, and a trial to show its nature, extent, and degree is not necessary. On May 6, 1940, in U.S. v. Socony-Vacuum Oil Co., supra, the Court held that horizontal agreements to raise prices are illegal per se. This holding was followed in Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951). Thus the extension of the scope of the illegal per se rule came after this Court's decree in Civil Action No. 249 which was entered in the light of what was then thought to be the law. That decree cannot be given the effect of permitting the defendant to violate the law as determined by the Supreme Court after that decree was entered.

For these reasons we find there is no genuine issue of material fact and the motion for summary judgment as pertains to chapter dues should be and is granted.

Finally the issue of whether the acts of defendant substantially affect interstate commerce is raised by the defendant. As to Bidding Rule C, this is a question of fact that must be determined at trial. In regard to the two other issues of quantity surveys and chapter dues included in defendant's members' bid prices, the effect upon interstate commerce is conclusively presumed as we hold them to be per se violations of the Sherman Act. See Las Vegas Merchant Plumbers Assn. v. U.S., 210 F.2d 732, 748 (9th Cir., 1954), cert. den. 348 U.S. 817 (1954); U.S. v. Pennsylvania Refuse Removal Association, 242 F.Supp. 794, 798 (E.D. Pa. 1965), cert. den. 384 U.S. 961 (1966).

Counsel will prepare and present a judgment in conformity with the foregoing.

New Orleans, Louisiana, this 30th day of December, 1968.

s/ HERBERT W. CHRISTENBERRY
UNITED STATES DISTRICT
JUDGE

Partial Final Judgment of the District Court

This matter having come on for a hearing before the Court upon a motion of the plaintiff for summary judgment, counsel for the parties having been heard, and the Court having determined, upon consideration of pleadings, admissions, responses to interrogatories and exhibits on file, that there is no genuine issue between the parties as to any material fact with respect to all of the claims involved in this action other than the claims based on Bidding Rule C of defendant's by-laws, and the Court having filed its opinion herein on December 30, 1968, granting the motion for summary judgment with respect to all claims other than claims based on Bidding Rule C, defendant's motion for re-argument having been denied by order of the Court, on March 28, 1969 and it appearing to the Court that there is no just reason for delay in entering a final judgment in accordance with that decision on all the multiple claims upon which summary judgment has been granted,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED

1

The Court has jurisdiction of the subject matter hereof and of the parties hereto.

II

The defendant New Orleans Chapter, Associated General Contractors of America Inc. has combined and conspired in unreasonable restraint of trade and commerce in violation of Section 1 of the Act of Congress approved July 2, 1890, as amended, commonly known as the Sherman Act (15 U.S.C. 1).

III

IV

The defendant, its successors, officers, directors, representatives, employees, members and all persons acting or claiming to act on behalf of the defendant are hereby perpetually enjoined

From, directly or indirectly, inducing or requiring members of the defendant or members to include in their bids on any building construction project in the New Orleans metropolitan area any charges for

a quantity surveyor

the chapter dues

VI

The defendant shall within sixty days after the entry of this judgment cause to be inserted in the trade magazine "The Constructor" a notice which shall fairly and fully apprise the readers thereof of the substantive terms of this Partial Final Judgment. Said notice shall be repeated in at least three consecutive issues of said trade magazine. Defendant shall file with the Court proof of compliance with this paragraph.

VII

For the purpose of securing or determining compliance with this Partial Final Judgment duly authorized representatives of the Department of Justice shall on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to the defendant made to its principal office be permitted subject to any legal recognized privilege

(a) Reasonable access during office hours of the defendant to all books ledgers accounts correspondence memoranda and other records and documents in the possession or under the control of the defendant relating to any matters contained in this Partial Final Judgment

(b) Subject to the reasonable convenience of the defendant and without restraint or interference from it, to interview officers, employees or members of the defendant, who may have counsel present, regarding any such matters.

Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, the defendant shall submit such reports in writing with respect to the matters contained in this Partial Final Judgment as may from time to time be requested.

No information obtained by the means permitted in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of legal proceedings in which the United States is a party for the purpose of securing compliance with this Partial Final Judgment or as otherwise required by law.

VIII

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Partial Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Partial Final Judgment, for the modification of any of the provisions contained therein, for the enforcement of compliance therewith and for the punishment of violations thereof.

IX

The plaintiff shall recover the costs of this action.

/s/ HERBERT W. CHRISTENBERRY
United States District Judge

June 24, 1969
Date

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No. 599

In the Supreme Court of the United States

OCTOBER TERM, 1969

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD W. McLAREN,
Assistant Attorney General,
GREGORY B. HOVENDON,
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in appropriate contexts, "[s]ummary judgments have a place in the antitrust field * * *." *White Motor Co., supra,* 372 U.S. at 259. See *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253; *Associated Press* v. *United States,* 326 U.S. 1; *International Salt Co.* v. *United States,* 332 U.S. 392; *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1; *United States* v. *Krasnov,* 143 F. Supp. 184 (E.D. Pa.), affirmed *per curiam,* 355 U.S. 5.

The court below was aware of the limitations on the use of summary judgment in antitrust cases. It refused to dispose summarily of the charge with respect to the Association's Bidding Rule C because, in its view, that charge presented an issue similar to that in *White Motor Co., supra,* in that it was not clear whether the bidding rule "has such a 'pernicious effect on competition and lack of any redeeming virtue'" as to preclude the possibility that "the application of the law [would be] influenced by the shape of the facts as they emerge at trial * * *" (J.S. 19).

As to the dues and quantity survey charges, however, the situation was quite different. No novel theory was presented by allegations that there was an agreement or combination to add certain fixed charges to the bid price. It has long been settled that any agreement or combination which "tampers with price structures" is illegal *per se* without inquiry as to its precise purpose or effect. *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221. See, also, *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U.S. 211, 213; *United States* v. *Trenton Potteries,* 273 U.S. 392.

The Association does not challenge the substantive rule of law applied by the district court. Instead, its contention appears to be that summary judgment was an inappropriate vehicle for resolving the issue whether there was an agreement or combination. It argues, on the basis of the affidavits it introduced, that the facts on which the government relied to show an agreement or combination were disputed. Almost all of these affidavits were, however, simply denials in general terms of the existence of an agreement (see n. 4, *supra*, p. 7).

Rule 56(e) requires that the party contending that there is a genuine issue for trial must do more than state conclusions; his response must set forth "specific facts." This requirement is especially pertinent where, as here, the government's case rested essentially on documents which originated in the Association's files, and the Association apparently would have had ready access to any countervailing proof. See 6 Moore, *Federal Practice* (2d ed.) ¶ 56.15[5].

A triable issue is not raised by the mere denial that an agreement exists "[d]espite the language contained in some of these documents * * *" (Def. Ex. 20, p. 1). For the subsequent exculpatory statements of Association officials and members that conflict with contemporaneous written documents neither undermine the impact of such documents nor bar summary judgment based thereon. See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395–396; cf. *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 82–86.

The Association is mistaken in its insistence that the district court's action "is a clear departure" from *United States* v. *Diebold, Inc.*, 369 U.S. 654 (J.S. 11). That case raised an important and unsettled substantive issue: the meaning and scope of the "failing company" defense in an anti-merger suit under Section 7 of the Clayton Act. The litigation was not simple and uncomplicated. The printed record alone exceeded 635 pages and included lengthy financial statements (No. 286, O.T., 1961, R. 223–258, 334–389) and other economic data (*id.*, R. 607–638), which permitted conflicting inferences. Moreover, there was a "head-on factual controversy" about an important aspect of the case. 369 U.S. at 655. Here, by contrast, the Association's response to the government's motion amounted to little more than bare denials in a case where the government's proof rested on incriminating documents from defendant's files. It was legally insufficient to create a bona fide factual controversy.

CONCLUSION

For the reasons stated the judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
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OCTOBER 1969.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 599

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *Appellant*

v.

UNITED STATES OF AMERICA

Appeal From the United States District Court for the Eastern District of Louisiana

BRIEF OPPOSING MOTION TO AFFIRM

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November, 1969

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 599

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *Appellant*

v.

UNITED STATES OF AMERICA.

Appeal From the United States District Court for the Eastern District of Louisiana

---

BRIEF OPPOSING MOTION TO AFFIRM

ARGUMENT

In its motion to affirm, the Government deftly attempts to shift the burden of proof to appellant, by urging affirmance on the ground of the alleged weakness of appellant's showing in opposition to summary judgment. This approach overlooks the fact that on

motion for summary judgment, the burden is on the moving party (in this case, the Government) to establish not only the prima facie truth of the factual allegations on which it relies, but also that there is no genuine issue or dispute as to the truth of any of those allegations. 6 *Moore's Federal Practice* (2d ed.), ¶ 56.15[3].

The Government's motion discloses on its face the paucity of the Government's showing in support of summary judgment. There is no dispute as to the basis on which appellant's dues are assessed or the terms of the quantity-survey contracts. But on the crucial factual issue of whether there was an agreement to include the dues and survey costs in all bids, the Government was able to adduce nothing but debatable inferences based on scattered excerpts from letters written many years ago, which inferences *were controverted* by the documentary evidence including affidavits filed by the appellant.

It is safe to say that no summary judgment has ever been affirmed on such flimsy support.

The *Argument* in the Government's motion to affirm skillfully pretermits any discussion of its own "evidence", and concentrates on the assertion that the appellant entered a "mere denial" rather than "specific facts". If the party moving for summary judgment has failed to conclusively establish not only the truth of his factual allegations but also the absence of a genuine dispute as to any of them, the opposing party is under no burden to file anything in opposition, and summary judgment must be denied on the basis of the inadequacy of the motion therefor. 6 *Moore's Federal Practice* (2d ed.), ¶ 56.15[3] at p. 2339.

The Government's argument on this point also ignores the fact that in addition to the specific sworn denials filed by appellant (and it is hard to see how else it could controvert the existence of an alleged agreement of which no direct evidence was presented), appellant filed contemporaneous documentary evidence negating the inferences sought to be drawn by the Government from the letters written 20 years ago by appellant's then managing director. This evidence consisted of minutes of a 1951 meeting of appellant's board at which its directors took cognizance of these letters and affirmatively disassociated themselves and appellant from the assumptions on which they were based (see motion to affirm, footnote 5*).

The Government's effort to distinguish *United States v. Diebold, Inc.*, 369 U.S. 654, on the ground that it "raised an important and unsettled substantive issue", is unpersuasive. This Court reversed a summary judgment in *Diebold* not because of the substantive issues involved, but because the District Court there, as here, had granted summary judgment on the basis of debatable inferences and the moving party had failed to establish the absence of a genuine issue of material fact.

---

* The Department of Justice investigation referred to in this footnote is a 1951 investigation, not the present one.

CONCLUSION

It is again respectfully submitted that *Diebold* justifies summary reversal of the judgment below.

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November, 1969

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IN THE

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OCTOBER TERM, 1969

No. 599

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v.

UNITED STATES OF AMERICA

Appeal From the United States District Court for the Eastern District of Louisiana

PETITION FOR REHEARING

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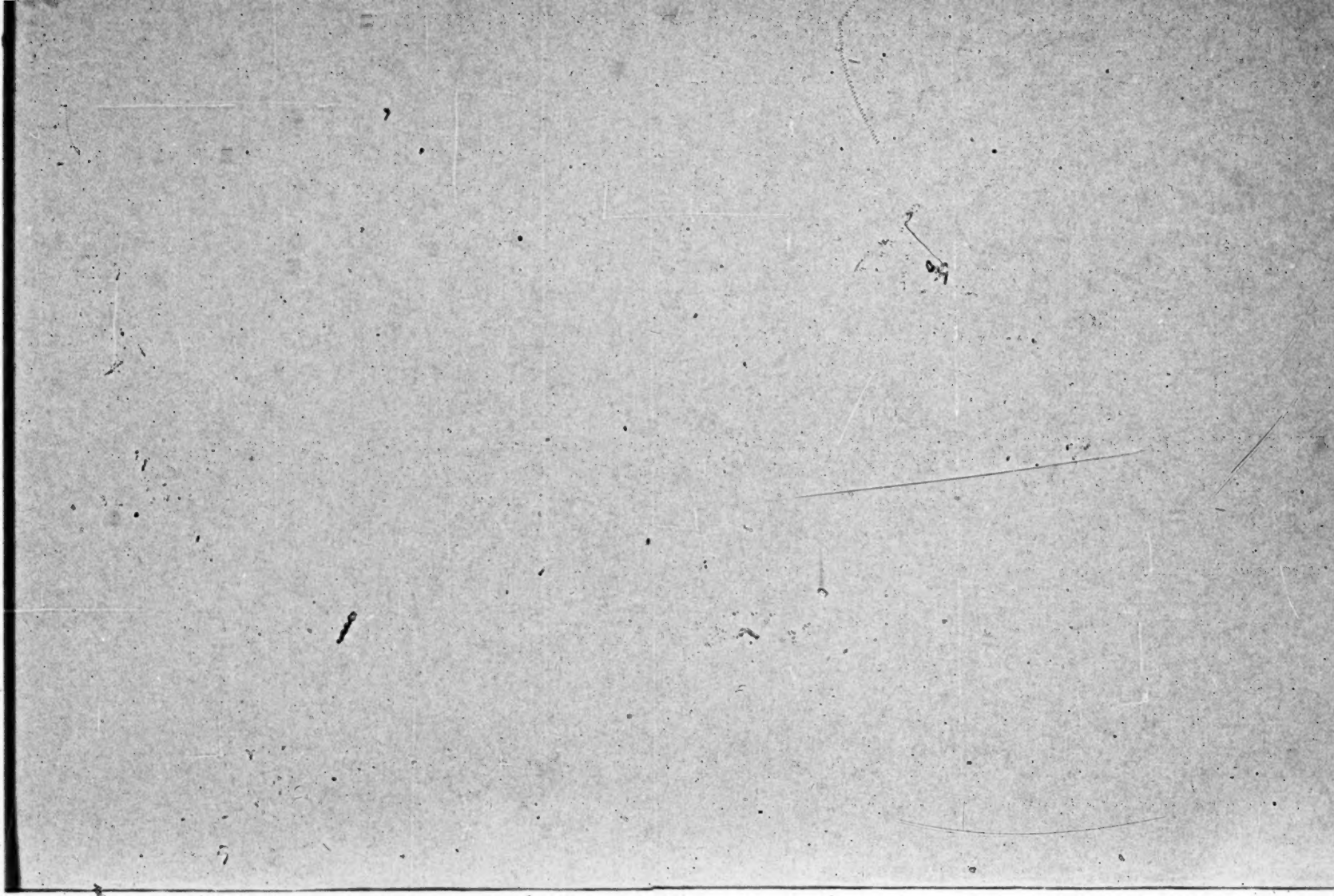

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 599

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *Appellant*

v.

UNITED STATES OF AMERICA

Appeal From the United States District Court for the Eastern District of Louisiana

---

PETITION FOR REHEARING

The appellant herein respectfully moves this Court for an order vacating the order granting the motion to affirm, entered on December 8, 1969, and for an order noting probable jurisdiction over this case.

Appellant submits that the district court's action in disregarding, on a motion for summary judgment, evidence adduced by the party against whom the motion was filed so violates Rule 56 of the Federal Rules of Civil Procedure as to warrant this Court's further consideration. It is the purpose of this petition for rehearing to draw to the Court's attention the failure

of the district court to consider the evidence introduced by the appellant which clearly establishes material issues of fact between the parties. Since the district court was required to consider *all* the evidence before it, its reliance, in granting the motion, upon only the evidence presented by the Government makes its action tantamount to a "trial" rather than a ruling on summary judgment. Appellants will demonstrate that the lower court based its decision exclusively on the Government's evidence and did not even refer to, let alone "consider in a light most favorable," appellant's detailed affidavits and other documentary evidence which rebutted the evidence presented by the Government.

As this Court is well aware, a motion for summary judgment tests the question of the existence of material issues of fact between the parties. If they exist, there is a trial; if they do not, the action may be terminated. The controverted issues of fact set forth below show that the trial court, rather than recognizing the substantial issues presented, chose to rely solely on the Government's assertions and terminate the case. This is not the legal question presented on such a motion, and appellant believes it can demonstrate to this Court the serious error in this case.

The Government's Evidence

The Government charges that AGC and its members engaged in a conspiracy consisting of a "continuing understanding and concert of action among" them, "the substantial terms of which" are (1) that each member should include in its bids the quantity survey fee and its AGC dues, and (2) that non-members "should be urged and induced to include" AGC dues in their bids,

and, if successful in obtaining a contract, to pay such dues to AGC (Complaint, § 15(a), (b) and (c)).

The Government's motion to affirm fairly summarizes the evidence it presented in support of its motion for summary judgment. On the dues issue the Government presented evidence establishing the fact that dues were paid by successful bidders as a percentage of the contract price, and the fact that appellant collected dues from non-member contractors bidding on New Orleans projects (Motion to Affirm, pp. 3-5).

The Government's additional evidence on the dues issue consisted of a 1950 meeting agenda in which appellant's former managing director Walker referred to "the *possible* disadvantage that local bidders might suffer, due to inclusion of the * * * fee [dues] in his bid when the out-of-town bidder does not include such a fee," and to "the policy of the Chapter Office to endeavor to get all bidders, whether Chapter members or not, to agree to put the Chapter fee in their bid" (Motion to Affirm, pp. 4-5, emphasis supplied); a series of 1949 letters by Mr. Walker to out-of-town contractors "suggest[ing]" that "cognizance be taken [of the dues] in computing your overhead costs" for a particular job (Motion to Affirm, p. 5); and three 1950 letters by Mr. Walker, one stating that "all of the contractors had agreed to the inclusion of the Chapter dues" in their bids on a job, another stating that "all of the out-of-town contractors who are not members of this chapter have nevertheless agreed to payment of the Chapter dues . . . in the event they are the successful bidder [on the latter job] . . . which puts all of the bidders on the same footing so far as Chapter dues are concerned," and the third stating that "I believe all of

our people put this figure in their bid" (Motion to Affirm, pp. 5-7).

On the quantity survey fee the Government presented evidence establishing the fact that appellant contracted with the Caraway Company for such surveys, and the fact that all of the appellant's members had to subscribe for the survey, which was paid for by the successful bidder (Motion to Affirm, p. 8).

Additionally, the Government's evidence on this issue consisted of a minute entry that one member stated that the survey fee "increas[ed] the cost of the job," and a letter in which another member (Mr. Gurtler) indicated that his firm included survey fees in its bids and that he assumed another member had done so in its bid on a Government job (Motion to Affirm, p. 9). The motion to affirm (pp. 9-10) refers to a series of letters by former managing director Walker to non-member contractors, but these merely described the arrangement between appellant and the Caraway Company.

Appellant concedes that the Government's evidence —*if* it were standing alone, uncontroverted and unexplained—could give rise to an inference as to the existence of the agreements and inducements with which appellant was charged. Indeed, it may even be assumed, *arguendo,* that such an inference would be the only possible one to be drawn from the Government's evidence standing alone. However, it was clearly erroneous for the lower court to grant summary judgment, as it did, on this basis. The court was clearly required to take into account the appellant's evidence controverting the Government's evidence and to view the total evidence in the light most favorable to appellant. *United States* v. *Diebold, Inc.,* 369 U.S. 654 (1962).

Appellant's Rebuttal Evidence

Appellant negated the inferences which might arise from the Government's evidence referred to above by introducing detailed factual affidavits by the former managing director who had written these letters and agenda, stating that when he did this he was newly employed and that:

> Frankly, as stated in the minutes of the meeting of the Board of Directors on November 12, 1951, attached hereto as Exhibit A which meeting was held subsequent to the dates of all of the Government exhibits attached to my affidavit, I naturally assumed that any contractor would put all of his direct and indirect costs of any kind into his bid. However, I did not know how any individual contractor handled the preparation of his bids. He could put in or leave out of his bids any item, and, neither I nor anybody else could possibly know that.
>
> But, I repeat, there was no agreement, tacit or express, among any of the contractors in our group at any time, to my knowledge, to include any item in the bids which they were submitting on projects. (Def. Ex. 20, p. 2)
>
> * * *
>
> During that time I was thoroughly apprised of all activities of the Chapter, and familiar with the circumstances and events that took place within the Chapter.
>
> I can state unequivocally that while I was associated with the Chapter, there was no agreement among the Chapter and its members, or with any non-member, that each member or non-member include in his bid price chapter dues or Caraway survey costs; and that during said time the Chapter did not urge or induce non-members to include chapter dues in their bid prices. (Def. Ex. 54)

Appellant also introduced the minutes of the 1951 board meeting in which this managing director was advised that his assumptions underlying the agenda and letters were unfounded (Def. Ex. 19). The Government found no evidence of any such activity of the managing director after this 1951 board meeting.

There was also presented by appellant a detailed affidavit by Mr. Gurtler stating that his letter introduced by the Government reflected nothing more than an assumption on his part that bidders included a survey fee in their bids along with their other costs (Def. Ex. 53).

Thus, every Government exhibit from which an inference of illegality could arise, was met by either contemporaneous documentary evidence or a "specific-fact" affidavit negating the inference. In addition—to make crystal clear and inescapable the genuine material fact issue as to the existence of the alleged unlawful agreements and inducements at issue—appellant presented numerous affidavits by its present and former officials, and by representatives of all of its members, categorically denying the existence of any such agreements or inducements (Def. Ex. 1, 21, 26-56).

These twenty five affidavits filed by defendant state that:

1. None of the members of AGC "has ever agreed with any other contractor, whether a member or a non-member of AGC, to include or exclude from our bids the Chapter dues payable with respect to each job or the fees payable for the Caraway or quantity survey" (Def. Ex. 27);

2. "There has been no understanding or agreement among the Chapter and its members, or with any non-

member that each member or non-member should include in its bid price chapter dues or Caraway survey costs" (Def. Ex. 52); and

3. "The Chapter did not urge or induce members or non-members to include Chapter dues in their bid prices" (Def. Ex. 52 and 54).

It is hard to see how appellant could any more plainly and forthrightly have established the existence of a genuine fact issue as to the existence of the agreements and inducements with which it is charged.

That the district court failed even to consider the evidence referred to above can best be seen by the court's very own words:

> *The evidence presented by the Government* admits of but one conclusion, namely that it was a practice of members of the defendant association to include the quantity survey costs in the bid price, regardless of whether such members desired or requested such quantity survey, and that the successful bidder only should pay those quantity costs. (Jurisdictional Statement, p. 20, emphasis supplied)

Had the district court only considered appellant's evidence it could also have said that it "admits of but one conclusion," namely, that the Government's allegations were untrue. What the court was required to do and what it failed to do was consider *all the evidence* to see if there existed genuine issues of material fact. See *Koleinimport "Rotterdam" N.V.* v. *Foreston Coal Export Corp.*, 283 F. Supp. 184, 187-88 (S.D.N.Y. 1968).

At a trial, the district court might reject the testimony of appellant's officials and members as to the non-

existence of the alleged agreements and inducements, and instead accept the inferences from the Government's evidence. It is plain under the decisions heretofore rendered, however, that the court had no right to make that choice on a motion for summary judgment. "To proceed to summary judgment it is not sufficient then that the judge may not credit testimony proffered on a tendered issue. It must appear that there is no substantial evidence on it." *Whitaker* v. *Coleman,* 115 F.2d 305, 306 (5th Cir. 1940).

The documents before the trial court, as appellant has demonstrated to this Court, presented "substantial evidence" but the court chose not to "credit" the evidence proffered by appellant. In reality it resolved the dispute solely on the basis of the Government's evidence rather than limiting itself to a determination of whether there were material issues of fact on the record before it. To "resolve" the dispute at this stage of the proceedings by totally disregarding and giving no weight to appellant's evidence deprives appellant of the benefit of a trial on the controverted fact issues involved. As a result, appellant stands faced not only with an unjustified perpetual injunction in this case, but with a serious inroad on its right to a fair and full trial in private treble-damage actions which may ensue.

The trial court's departure from the accepted summary judgment standard is unprecendented, unwarranted and severly prejudicial to the rights of appellant, who had clearly set up material issues of fact between the parties.

Conclusion

For the reasons set forth above, it is respectfully submitted that the questions presented by this appeal are most subtsantial, not only to the interests of appellant but to the future administration of summary judgment in the federal courts. Accordingly, appellant prays that this Court grant rehearing of the order of affirmance, vacate that order and note probable jurisdiction over the judgment of the district court.

Respectfully submitted,

R. Emmett Kerrigan,
Ralph L. Kaskell, Jr.,
George W. Wise,
Attorneys for Appellant

Deutsch, Kerrigan & Stiles,
Hogan & Hartson,
Of Counsel

January 2, 1970

Certificate of Counsel

As counsel for the appellant, I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay.

R. Emmett Kerrigan

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. *v.* UNITED STATES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

No. 599. Decided December 8, 1969

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE BLACK is of the opinion that probable jurisdiction should be noted.